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ABSTRACT

Two strong constitutional principles--the right of privacy and freedom of the press--are headed for a major confrontation in the courts. This document explores the complex problems involved in balancing the interests of individuals and of society (the first amendment is a remedy against government, not a weapon against the people). Consideration is given to this topic in relation to Congress (privacy, criminal records, and the sealing of records); the courts (lawsuits and expungement); the states; and specific problems in St. Louis, Houston, California, and Nashville. The paper concludes that, although it will not be easy to find a proper balance, it must be done, as the alternatives appear to be more of the kind of mass confusion that has spread throughout the United States and a continuing proliferation of personal information through electronic data systems. (JM)

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PRIVACY AND THE FIRST AMENDMENT

by Paul Clancy

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INTRODUCTION

There has been, as Mr. Justice White recently observed, "a strong tide" running in favor of the right of privacy. It is an evolving and fragile right that is still open to conflicting interpretation. But judging from the raft of legislation, court activity and the applause given to politicians who invoke it, privacy is a concept and an issue whose time has come in this country.

Spurred by growing pressures from crowded city life, by the fantastic and vaguely threatening advances in computer technology and by the recent misuse of government power, Americans are demanding laws to guard their privacy and, more and more often, compensatory damages when they believe their privacy has been invaded. The press, on the other hand, has enjoyed an almost unchecked expansion of its freedom to publish the truth--and even, in some cases, untruth. It has recently even enjoyed the heady sensation of helping to topple a government.

There has always been what Professor Arthur R. Miller describes as "an uneasy truce" between freedom of expression and privacy. Now it appears that the truce is over and that the two strong constitutional principles are headed for a major confrontation in the courts. But in the meantime there will undoubtedly be some bruising conflicts.

Right now the question is a political one. The focus is on legislation designed to protect individuals from the

harassment of public and private computers and from the dissemination of personal information. There is little doubt that something must be done to protect the individual from zealous record keepers. But the danger is that as laws are enacted in the name of shielding the public, the rights of Americans to have a free press will be diminished. Inevitably the winner is not the public but those who look with favor on secret government.

The problems are certainly perplexing, but it is clear that a way must be found to balance the interests of individuals and of society--for that is what it comes down to: the First Amendment is a remedy against government, not a weapon against the people.

BACKGROUND

The classic argument establishing a basis for the right to privacy in this country dealt extensively and harshly with the press. In their 1890 Harvard Law Review article, Samuel Warren and Louis D. Brandeis chastised the press for "overstepping in every direction the obvious bonds of propriety and of decency."

> Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers.... The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has

> become more sensitive to publicity, so that solicitude and privacy have become more essential to the individual.

Almost 40 years later Justice Brandeis set forth what has become an enduring assumption: that the makers of the Constitution conferred on the individual "the right to be let alone--the most comprehensive of rights and the right most valued by civilized man."

Brandeis was writing then about invasion of individual privacy by government, and that is what we are intensely concerned with today. There have, of course, been the well-publicized monster invasions of the Plumbers, the Army, FBI and CIA. These have been courageously exposed and properly condemned. What is probably equally threatening to the individual--but far less publicized--are the more subtle invasions by a supposedly benevolent government. The records of these small intrusions, many of them public, are on file everywhere. If the press is on the side of these individuals, it is concerned not so much with who they are but whether or not the government is doing its job. The "ultimate invasion," as Professor Alan Westin says, occurs when the information is published, because then "everybody knows about it."

The right of privacy is the right of the individual to control what others know about him. Must he surrender this right every time he comes into contact with his government? How about when he becomes the victim of a

newsworthy crime or is inadvertently caught up in the news event of the day? And does he surrender his privacy only temporarily and selectively, or is the information about him "spread broadcast"--from one agency of government to another, from government to private business, from government to the media?

Some of these questions are being answered in state courts and state legislatures--and badly, many editors believe. The new standards, applied without clear guidelines from Congress or the higher courts, sharply restrict press access to public records and impose stiff penalties on officials for disseminating supposedly private information.

In short, the suspicion is growing--and it may be well-founded--that some courts, some legislators, some bureaucrats who would not have thought of it before are using the strong tide of privacy as a way to get the press.

There is, the fears of the press notwithstanding, an obvious need for legislation on the federal level.

Whether it is the new mother who is irked by calls from diaper service companies, the elderly couple pressured into answering census questions about their dentures, the applicant for federal employment forced to answer questions about his sex life, or the once-arrested-but-never-convicted citizen who cannot shake his "record," the problems are real ones.

Government, particularly the federal government, has not shown great respect for the privacy of its citizens. There has existed the uncomfortable feeling that Big Brother was prying into our lives, and recent trends in information collection and computerization have done nothing to dispel these fears. There is pressure, too, from the private sector. The none-of-your-business attitude that was once a proud American tradition has softened under the lures of easy credit, job security and mass conformity.

The most serious problem is the traffic in arrest records. There is now a massive web of information sharing systems trading in this commodity. Despite a constitutional presumption of innocence until proven guilty, the fact of arrest is an indelible stain. No matter that the crime was minor and justice substantially served, that the arrest was frivilous or arbitrary, that there was no prosecution or conviction: the record, stored in local police files and the unblinking memory bank of the Justice Department, is almost never forgotten. Moreover, it is available on demand to virtually anyone who wants to have a look at it.

What has magnified the need for controls is the efforts by the Justice Department, going back to 1969, to set up a nationwide criminal record system, with as many as 45,000 law enforcement agencies around the country putting information in and taking it out. Each would be able to get an instant fix on any suspect. According to the

American Civil Liberties Union, 65 percent of white urban males and 90 percent of black urban males are arrested at some point in their lives. If so, that is a lot of people permanently stigmatized. As Aryeh Neier, executive director of the ACLU, said during Senate hearings,

> The dissemination of arrest and conviction records causes millions of people to lead furtive existences. They either try to escape the criminal labels attached to them or, finding that struggle hopeless, conform to the labels.

CONGRESS

In his first address to Congress after assuming the presidency, Gerald R. Ford promised that there would be a "hot pursuit of tough laws to prevent illegal invasion of privacy in both government and private activities." The pursuit was already well under way. The trouble was it was already too hot, and freedom of information considerations were being largely ignored.

Privacy

The Privacy Act, the product of nearly a decade of study, was signed into law on the last day of 1974. The purpose, as the legislation states, is "to provide certain safeguards for an individual against an invasion of personal privacy." It gives individuals access to records which government agencies keep about them; moreover, it prohibits, with penalties, the disclosure of personal information about

people without their approval.

These restrictions originally applied to the press--that is, during the drafting of the bill. This would have shut the press off from records that have long been considered public. But the final version specifically exempts disclosures that are permitted under the Freedom of Information Act. So the act, in spite of the way some states have been interpreting it, does not touch the press. As before, under the FoI Act, the press is entitled to all information except that which, when disclosed, "would constitute a clearly unwarranted invasion of privacy."

As the staff of the Senate Government Operations Committee said,

> This provision was included to meet objections of press and media representatives that the statutory right of access to public records and the right to disclosure of government information might be defeated if such restrictions were placed on the public and press.

In the aftermath of Watergate and the era of heavy surveillance of private citizens, this additional statement is significant:

> While the Committee intends in this legislation to implement the guarantees of individual privacy, it also intends to make available to the press and public all possible information concerning the operations of the Federal Government in order to prevent secret data banks and unauthorized investigative programs on Americans.

The act also established the Privacy Protection Study Commission which, in late 1975, began a two-year study of

what other kinds of record-keeping organizations, including private industry and state and local governments, should be added to the scope of the act. At hearings held in June, 1974, the fear was expressed by a press representative that even newspaper "morgues" would be covered by the act. Such libraries, after all, contain files on individuals. This clearly was not the intent of the drafters of the act. Yet, in an interview on September 22, 1975, in the Washington Star, Commission Chairman David F. Linowes is quoted as saying that this area should be studied: "What happens to material accumulated in newspaper 'morgues'? Who has access? When does freedom of the press and the right of privacy conflict?"

There are other warnings. Rocky Pomerance, Miami police chief and president of the International Association of Chiefs of Police, said in opposing criminal information legislation,

> While we are discussing the media, it would appear that although the police are denied access to arrest information of specific nature, the news media have their morgues and we could be going to the newspaper morgues to get our information which we need to operate.

Criminal Records

Senator Sam Ervin, who led the fight for much of the privacy legislation, recited a line of poetry to Jeb Magruder after President Nixon's deputy campaign director

admitted to committing perjury. It summed up Ervin's views on atonement:

> Each night I burn the records of the day.
> At sunrise every soul is born again.

In early 1974 Ervin held hearings on criminal justice data banks and introduced legislation to restrict the interstate dissemination of certain types of criminal records, particularly arrest records. Representatives of the press cautioned against converting an essentially public record into a private record. "Crime is not a kind of private matter between the criminal and the state," said Harold W. Andersen, president of the Omaha World-Herald.

But some privacy advocates argue that an accusation, at least until proven one way or the other, should not be made public. At hearings conducted in 1975 by the Senate Subcommittee on Constitutional Rights, Aryeh Neier of the American Civil Liberties Union said the press had no valid First Amendment claim to inspect police blotters or other arrest information.

> If the victim of an arrest consents, the arrest record should be made public. But it is sheer gall for segments of the press to insist, as they do, that to protect individuals from bad arrests, law enforcement agencies should disclose arrest records even where the subject of the arrest doesn't want the records disclosed.

The press, which is generally selective about reporting arrests, believes strongly that the public has a right to know who is being arrested. The concern turns less

on individual rights than on the performance of the police. "What you're talking about," says Jack C. Landau, court reporter for Newhouse Newspapers and co-founder of the Reporters Committee for Freedom of the Press, "is the privacy of the government. You're saying the police have the right to arrest people and never tell you." This, as the report will show later, has already happened in some states.

"The most fundamental power the government has, the bottom line, is taking away liberty," Landau says. "It is so important and significant to individuals, government has got to be publicly accountable for it, whether it's right or whether it's wrong."

Norman E. Isaacs, publisher of the Wilmington Morning News and Evening Journal, says the principle of the "open arrest book" must not be violated. "Then we are in a terrible state. Then the police arrest anybody they choose, under any pretense, and lock them up. They don't have to notify family or anybody else; we're right back into the worst of all repressive systems."

Recognizing the concerns of the press, the legislative drafters exempted "records of entry such as police blotters." But there is strong sentiment in Congress for making it difficult--if not impossible--for the press and other members of the public to obtain criminal records or "rap sheets." Such alphabetically listed and increasingly

computerized records consist of notations of arrest, detention, indictment or other criminal charge and--at least theoretically--the disposition of each charge.

Subcommittees on Constitutional Rights in both the House and the Senate have proposed nearly identical legislation. Representative Don Edwards of California, chairman on the House side, said in an interview, "You can't really expect it's appropriate for a reporter to go in and say, 'Has John Smith ever been arrested?' The whole purpose of the rap sheet has been to permit officers of the criminal justice system to do their jobs."

In most jurisdictions, reporters have been permitted, by custom, to get such information. It was an informal procedure and it helped to know the officer in charge. Said Gene Miller, police reporter for the Miami Herald for 17 years, "If you've been at it as long as I have, you have friends. It (the legislation) would be very complicated if they stuck to it." But Miller, like other good reporters, has learned that just because something is on the record doesn't make it accurate. It is a jumping off place.

What the legislation does, then, is open the door, partly by saying that police officers are not prohibited from confirming that a named individual was on a specific date arrested or indicted. In other words, without some independent information, either from newspaper files, a reporter's memory, a tip from a friendly prosecutor or some

other source, the reporter is up a creek.

Only the police blotter would be at his disposal. Without knowledge of a specific date on which a person was arrested he could spend hours or days searching for an entry. As Richard M. Schmidt Jr., counsel for the American Society of Newspaper Editors, complained, Congress was "attempting to make it as difficult as possible for a reporter to obtain the information and go through the Mickey Mouse of searching chronological records."

That was not the intent, but the result. Even though the legislation was still a long way from passage, the limitations were sharply felt in many cities in mid-1975 when regulations issued by the Law Enforcement Assistance Administration went into effect. In effect, the LEAA reg's said that if you wanted to see a criminal record, you had to ask for it by name and date. There could be no "general fishing expeditions into a person's private life."

This situation was abruptly changed in March, 1976. Responding to a general uproar from the press, the LEAA did a complete switch, saying that there should be no limitations on the dissemination of conviction records or criminal history information contained in court records. This action was certain to have a strong impact on Congress, probably killing further attempts for the next few years to write legislation.

But undoubtedly the interest in such legislation will not diminish.

The problem, it seems to me, is that society has placed such a high premium on arrest information that it has thus fostered the conclusion that being arrested is the same as being convicted. As Mark Gitenstein, former counsel for the Senate Constitutional Rights Subcommittee and original drafter of the legislation, put it, "To me, it is no different than the government labeling people as subversives or extremists. If it is wrong to label someone who is not indeed that kind of person, then it's wrong. Period."

Actually, Gitenstein, pointed out, the legislation was not intended to flatly deny access to criminal records but to require states, if they wished to make the records public, to say so. The proposal does contain a clause which permits access for noncriminal justice purposes "only as provided in this act or where authorized by applicable Federal or State statute or executive order." Gitenstein acknowledged that it would be better to declare the records public unless prohibited by the states.

Helen Lessin, counsel for the LEAA, said it should be completely up to the states:

> People can be very liberal and make everything public or close things down completely. It's a judgmental factor: if you want the records to remain available, pass a statute. All sorts of people for all sorts of reasons have been able to get at these records. If you want this to continue, make it official. If it's important to know if a public official was ever

> arrested--whether he was found guilty or not--if this is the way the balance should go, then those records should be open. We can't make those decisions on the federal level; the states should be doing it.

Whether they actually would, however, is open to question. The tendency has been just the opposite. Citi and whole states seized on the LEAA regulations, the Privacy Act or their own privacy or criminal records acts to close down police information entirely.

It is noteworthy that many cities--including St. Paul, Minnetonka and Glencoe, Minnesota, where implementation of the LEAA guidelines has coincided with a tough new state privacy law--had already put the regulations into effect, although they were not required by law to do so until December 31, 1977. It had only been required that cities and law enforcement agencies receiving LEAA funds issue preliminary plans for implementation of the regulations by December 31, 1975.

Privacy is no doubt an extremely popular issue on Capitol Hill. The same cannot be said for freedom of the press. There just are not many members of Congress who regularly speak up in favor of First Amendment principles or, perhaps, really understand what William O. Douglas mea by "rough and tumble discourse." Members of Congress and their staffs seemed genuinely surprised at the vehement reaction by many segments of the press.

"Regardless of the intent of its supporters, this

legislation, under the laudable goal of protecting privacy," wrote the Los Angeles Times, "would increase the power of government to withhold from the public information the public has a right to have."

W.H. Hornby, executive editor of the Denver Post and chairman of the American Society of Newspaper Editors' Freedom of Information Committee, writing in the Columbia Journalism Review, said information about police activities must be available

> if the rights of due process and of speedy trial are to be preserved. We still need to know who is in jail and what the charges are against him. We still need to know who has been indicted. If we don't insist on this knowledge, we are in the same position as the Germans who, in their privacy, wondered about the sighing cargoes of those long freight trains that passed in the night.

In a letter to Senator John Tunney, chairman of the Senate Constitutional Rights Subcommittee, Jerry W. Friedheim, executive vice president and general manager of the American Newspaper Publishers Association, warned,

> It is an unquestionable fact that democratic government ceases when the press is muzzled. It is another unquestionable fact that once the press is muzzled, the judicial and other criminal justice functions of the country cease to work in behalf of the people of the country. A fettered press is a fettered public!

Constitutional authorities are divided on the issue. In fact, recognizing that there is a clash between two strong constitutional principles, they admit to a certain ambivalence. Says Harvard's Arthur R. Miller, a foremost privacy authority,

> Frankly I do not see the utility in terms of First Amendment principles of automatically granting the press access for publishing a lot of criminal justice information about one or two prior arrests that are not followed by prosecution or conviction. I think the scarring effect far outweighs the public's right to know that kind of data. But when you're talking about prior convictions of the accused, then I suppose the balance tilts in favor of the public's right to know the prior, adjudicated criminal record of somebody who has been accused of another crime.

But Miller says he finds the police blotter issue troublesome. "I would say that that's one where it's damn near a coin flip as to which way it should go. I'm very troubled by it--on both sides."

Thomas Emerson of Yale, a noted First Amendment expert, says that concealing criminal records is carrying privacy too far:

> I would not define privacy in such a broad way. It doesn't seem to me that arrest records and criminal records ought to be concealed within the definition of privacy. I don't think that's the kind of privacy that should be protected.
>
> If the individual has done something which is a public offense, then it puts it in the realm of public information, and even though it's something a person may not want to be known, that really is not the test.

But Emerson believes that at some point, after a person has been acquitted, the arrest record should be expunged or sealed.

Sealing

There seems to be a consensus among key figures in Congress, the Ford Administration, the courts and--up to a

certain point--the press, that some arrest records and even records of criminal convictions ought to be expunged or sealed after they lose their value or when they clearly impinge unfairly on a person's rights.

Tunney, "caught in a balancing act" between privacy and freedom of expression, said some accommodation had to be made:

> You cannot have full press freedom. The libel laws are a perfect example of a circumspection of press freedom. I think there is a right for a person to have a past arrest record sealed and remembered, perhaps, by those who knew about it at an earlier time, but not readily available to everybody that wants to take a look at it. There does come a time, I think, when a person ought to be able to redeem himself.

In his appearance before the Edwards subcommittee, Deputy Attorney General Harold Tyler said that any legislation designed to protect individual rights "involves a tension between the public's right to know and the individual's right to preserve a certain zone of privacy into which the public cannot intrude." This is especially true, he said, with respect to criminal justice information.

> If records of arrests, court proceedings, and correctional decisions are not publicly available, then the public is not only generally uninformed about its criminal justice process, but individuals risk all of the dangers inherent in secret arrests, star chamber proceedings, and banishment to secret prisons.
>
> Yet if a past record, already paid for, can follow an individual for the rest of his life, threatening his employment opportunities and his acceptance in his community, our hopes of rehabilitating offenders through improved correctional services are impeded.

Congressman Edwards said there should be some provision for rewarding someone who becomes a "model citizen" after serving his time.

Both the Edwards and Tunney bills, in their latest forms, would provide that, at a minimum, criminal record information concerning an individual shall be sealed after seven years in the case of a felony, five years in the case of a misdemeanor--as long as the subject stays out of trouble. Also, arrest records without convictions or prosecutions would be sealed within five years. States without computerized systems would not be required to comply.

Press reaction to sealing laws is mixed, although in this case it is not the government seeking to keep the press away from public records but, in effect, pretending that the records do not exist.

"We are criticized in this country for having a lack of a sense of history," says James Goodale, counsel for the New York Times. "Here we are trying to pretend things don't happen that happen." Jack Landau of the Reporters Committee does not think records should be concealed any more than acts of Congress that are thrown out by the courts or actions by the President that are revoked should be wiped off the record books. But neither of these has to do with individual privacy. The ANPA's Friedheim suggested that perhaps less severe offenses, such as petty theft, shoplifting, simple assault and possession of small amounts of marijuana, could

be sealed, but not serious crimes.

THE COURTS

Over the past decade the courts have expanded the right to publish to a point where it is difficult to say what is not covered by the First Amendment. In Time Inc. v. Hill (1967) the Supreme Court declared that "A broadly defined freedom of the press assures the maintenance of our political system and an open society." In New York Times v. Sullivan, it saw "a profound national commitment to the principle that debate on public issues should be uninhibited."

At the same time that the rights of the press have been expanding, so has the notion that there is a constitutional right to be left alone. Justice White observed in Cox Broadcasting Corporation v. Cohn (1975) that "powerful arguments" have been made that "however it may be ultimately defined, there is a zone of privacy surrounding every individual, a zone within which the state may protect him from intrusion by the press, with all its attendant publicity." Privacy is being defined in the courts and within academia as the ability of people to control what others know about their lives--whether told to a single individual or, through the press, to everyone in the community. When you tell the press, you tell everyone. When you tell the government, who else finds out?

Privacy trends in the courts are difficult to follow. The issues of privacy and a free press seem at times irreconcilable, as Don R. Pember and Dwight L. Teeter, Jr. said in Publishing, Entertainment and Advertising Quarterly. "The requisite openness of a democratic society seems to be the antithesis of a right to be left alone: the most timid or reclusive soul may be stripped of his privacy if he unwittingly becomes enmeshed in a newsworthy event."

The Supreme Court has clearly held in libel suits that public officials must prove "actual malice" or a "reckless disregard" for whether a statement was true or false. The law of privacy is less clear, although it appears that there is no such right for public officials or their families. Perhaps there should be. Professor Charles Frankel, in an interview with the Washington Star, said he thought that

> newspapers often probe into aspects of people's private lives that common respect and decency would indicate should be left alone. I think this is particularly true with respect to government officials. Take the case about Sen. Muskie's wife--he then was running for president, asking for the people's trust, and it was reasonable that his life both in public and private be subjected to scrutiny. But it seems to be a little rough to bring his wife into it. I think that Mrs. Ford and Mrs. Rockefeller, with respect to their medical problems, received too much attention from the press. The lesson that the press seems to be teaching the world is that nothing is to be private, including your spouse's medical history.

The court has recently made a distinction in libel cases between "public officials" and "public figures"--

private individuals who inadvertently become entangled in newsworthy events. Perhaps it will do the same with privacy suits.

Legal scholars suggest that such public figures, the otherwise private citizens who become either victims or participants in events, should not be identified unless they want to be. The fact that a young woman suffers from compulsive overeating may be relevant to self-governing choices by the public; publishing her name and photograph may not. Suits for privacy injury focus not on news content but on identity: the life of a prostitute, the decline of a genius, the disruptive behavior of a school child.

Reporters often feel that they wield a benign weapon and that a little publicity won't hurt anyone. But it does, those most frequently hurt being the victims of crime. For instance, the victim of a successful break-in or robbery becomes a prime candidate for a second break-in or robbery.

Although one may feel sympathy for Spiro Agnew--who frequently tells reporters, "You harp about the right to privacy. How about giving me some?"--he will probably always be haunted by someone in the media. But what about the San Francisco man who saw the gun pointed at President Ford and, in a reflex action, lunged for it? Are the press stories reporting that he has a homosexual background the cost of a selfless act in our society? Does that person become fair game? If so, for how long?

Lawsuits

The growing concepts of privacy and freedom of the press appear to be headed for an inevitable collision in the nation's highest court. When that happens both sides may have to give ground. Meanwhile, there are a growing number of lawsuits.

Says New York Times counsel Goodale, "Privacy law is an evolving force. Now you can sue for violating privacy where you can't sue for libel. Unlike the law of libel, where truth is a defense, here you're dealing with a law where truth is not a defense. What we're saying is that we don't want the dissemination of embarrassing facts."

The most important of these recent privacy suits involve publication of the names of rape victims. This appears to be a clear cause for damages unless the identity of the victim is obtained from official court records. The court, citing Justice Douglas, said there is no liability in the republication of what is already clearly "public property."

"The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business," the court ruled in Cox Broadcasting Corporation v. Cohn. In this case, the court held that WSB-TV in Atlanta was not liable for damages for broadcasting the name of a 17-year-old rape victim because

the reporter had obtained her name from indictments obtained in court.

The courts, of course, are not called upon to comment on questions of ethics or taste. Certainly the media may print or broadcast anything in the public record. But should it?

In contrast to the situation in Cox, the Washington Post did not rely on court records in publishing the name, age and address of a 21-year-old rape and stabbing victim. The Post claimed it is constitutionally privileged to publish truthful accounts of all matters of public interest. But Judge Samuel B. Block of the D.C. Superior Court did not agree.

Block wrote that the newsworthiness of an event "may not always constitute a complete defense to an action for invasion of privacy." Although in most cases the balance is weighted in favor of freedom of expression, Block said in this case the publication of her name and address "deeply intrudes upon her private affairs. The extreme embarrassment and harassment endured by rape victims, and the young age of the plaintiff, are factors weighing in favor of protecting her privacy" (Hunter v. Washington Post, 1974). After an appeal of its motion to dismiss was denied by the D.C. Court of Appeals, the Post settled with the victim for an undisclosed amount.

Hunter is one of the only cases in which damages have

been awarded for publication of a truthful account of a matter of public interest.

Expungement

If you were a historian searching for evidence--other than newspaper files--that 13,000 persons were in May, 1971, wrongfully arrested, you would be out of luck. The mass arrests were found to be unconstitutional by the U.S. Court of Appeals for the District of Columbia and the lower D.C. court then ordered that "all records...that would in any way relate" to the illegal arrests, including reports, memoranda, finger print records, photographs, and court records, be turned over to those who initiated the class action suit.

The fact of the arrests thus became a non-event, a piece of history that now lives only in newspaper files and individual memories.

Another expungement case, also arising in Washington, D.C., involved a man wrongfully charged with murder. Three days later, after tests showed that the deceased had committed suicide, the charge against Warren Hudson was dropped. He petitioned to have all records of the arrest expunged and, in February, 1975, Harold H. Greene, chief judge of the D.C. Superior Court, granted the request in a voluminous ruling. "The mere existence of an arrest record, whether amplified or not, and whether or not followed by a conviction, will inevitably effect the arrestee adversely

and in countless ways subject him to a host of disabilities." Among these, Judge Greene said, are the man's future dealings with the police, prosecutors and courts, his ability to get a job, whether in the government or the private sector, his chances of securing loans and of obtaining professional licenses. The fact that he was once arrested has no law enforcement or any other value, he said, adding:

> The plain fact is that, when necessary to produce equitable results, to prevent injustice, or for other policy reasons, our system of law has traditionally rendered existing documents and transactions null and void; permitted the denial of some facts; and engaged in the adoption of presumptions and <u>legal fictions</u>. (emphasis added).

Greene said it was difficult to understand the reasoning that not preserving arrest records of persons later found innocent would somehow violate the integrity of the law or enable courts to rewrite history. The argument loses even more force when one considers that solemn marriages celebrated by a minister in the presence of a vast wedding party can be obliterated and annulled. So then, Greene reasoned, the law can, in the interest of justice, remove the badge of arrest from an innocent man.

"Failure to expunge an arrest record of an innocent person violates important constitutional protections, including the right to privacy and due process," he said. The case is now on appeal.

These are two of the most prominent examples of what is becoming a clear trend in the courts.

The Maryland Court of Appeals also held recently that a man wrongfully charged with committing an unnatural sexual act may have his record erased. The court said that "the right of privacy is protected by the Constitution" and therefore "regulation limiting it must be justified by a compelling state interest."

There are also a number of court decisions involving FBI records. U.S. District Judge Gerhard A. Gesell has called the dissemination of these records to state agencies and private employers "out of effective control." He said that "the overwhelming power of the Federal Government to expose must be held in proper check" and invited Congress to adopt a national criminal records policy. The legislation before Congress in late 1975 was a direct response to this challenge. Although no action was taken on this legislation in the First Session of the 94th Congress, it seems almost certain that the bills will appear on the calendar in the 1976 session of Congress.

THE STATES

At the same time states appear to be permitted to open up arrest and conviction information by law, they are also entitled to close such information down.

In Connecticut, for example, whenever the accused in a criminal case is found not guilty or the charge is dismissed, all police and court records and records of the

prosecuting attorney are required to be immediately and systematically erased. In Louisiana, the same applies, and the subject of an arrest may say 'no" if asked if he has ever been arrested. At least 20 states now have some provision for expunging or sealing records. Often it is a matter of time, generally seven to ten years for a felony and five for a misdemeanor. New laws were passed in 1975 for Maryland, Rhode Island and Utah. In Maryland, an acquitted person may petition the court to order all police and court records relating to the charge destroyed. In Utah, once criminal records have been ordered sealed, "the case shall be deemed not to have occurred, and a petitioner may answer accordingly any question relating to it."

Massachusetts has had a great deal of experience with privacy and criminal history legislation. Former Governor Francis Sargent made privacy a popular issue during his administration, and in 1972 the state passed a general right to privacy law. It has also established the Massachusetts Criminal History Systems Board, which is preparing to set up an elaborate computerized record keeping system. After a convicted felon has served his time and has spent seven years without further trouble with the law, his record is to be switched from "on line" to "off line" in the computer and will no longer be generally available. Misdemeanors are to have a five-year waiting period.

The state is very choosy about letting the federal

government have access to its records because federal standards for dissemination of criminal record information are much looser than its own. After a furious fight with Washington, the state has refused to join the National Crime Information Center.

Massachusetts has a strict open records law. But in order to safeguard private information it is very strict about what goes into and stays in the records. All vital statistics are public, except for records of illegitimate births, abnormal sex births, fetal deaths and marriage records where a physician's certificate has been filed. People have a right to inspect the records about themselves, to have all non-academic information held by public schools destroyed after four years, the medical records kept by hospitals or clinics destroyed 30 years after final treatment. Public health records are closed to the public. Welfare records are destroyed in 10 years. A first-offense conviction for possession of marijuana is sealed immediately. It is illegal for an employer to ask about arrest records or to discriminate in hiring or promotion against someone who was arrested but not convicted. One of the latest developments is that residents of the state are not required to furnish their Social Security numbers to such agencies as the State Registry of Motor Vehicles. Backing up these and many other privacy policies are a State Privacy Commission, a Privacy and Security Council and a Privacy Division within

the Attorney General's Office.

Harvard's Professor Miller, who is chairman of the Privacy Commission, leans toward the privacy side:

> I think a society like ours, like Massachusetts, has the right to make the judgment that at a certain point in time the information is so old and sufficiently threatening to an individual that it outweighs its value as news.
>
> You know, you're talking about a human being whose ability to function in society is largely dependent on whether that ancient information is circulated about him--as against the right of the press to publish information which by definition is old and for which by definition the individual has supposedly paid his debt to society.
>
> I have never been an absolutist about the First Amendment; I know many press people are. But fortunately I happen to believe there are other values in society, and I find the public interest in a prior and ancient conviction to be of very low significance.

Jonathan Brant, the young assistant attorney general in charge of the Privacy Division, is a privacy absolutist. If he had his way the press would not be entitled to any arrest information. He states flatly, "I don't think the names of people who are arrested should be in the paper."

He acknowledges that responsible journalism obliges newspapers to print what the public needs to know. "But I don't think it does anybody any good to know that Joe Blow was picked up for armed robbery yesterday." Perhaps, he says, one should know that there were a number of armed robberies in a particular neighborhood, "but to know that particular people were arrested or convicted or sent away or not sent away or placed on probation, I don't think is of concern to the community."

Brant says that in making laws and rules he would prefer to err on the side of keeping information private, "recognizing that it may restrict good reportorial investigation."

Like many other civil libertarians, Brant believes that the eventual sealing of records is vital to corrections. "Supposedly we believe in rehabilitation here and reward people for going straight, and that to me is the prime value and the one to be most protected."

The privacy trends in Massachusetts have not met with strong opposition in the press, although in a recent speech Gerald T. Tache, president of the Massachusetts Newspaper Publishers Association, fired a warning. He said the association does not question the good intentions behind the numerous privacy efforts. But viewed as a whole, he said, "they represent a most unhealthy and pervasive invasion of (a) the public's right and need to know; (b) the highly essential open administration of justice; and (c) the constitutional rights of a free press."

Replying to Tache, Attorney General Francis X. Bellotti said freedom of speech is no more absolute than the right of privacy. "There is no 'uninhibited marketplace' of speech about an individual's character and reputation."

SOME PROBLEMS

There is a well-justified fear among the press that

the states are not likely to interpret the laws and regulations eminating from Washington to mean that they should make their records more accessible to the public. These fears were partly born from the experience of two states, Hawaii and Oregon.

From a story appearing June 8, 1974 in the Honolulu Advertiser:

> It was a "routine" day in Honolulu yesterday, police said.
>
> End of story, because that's the way the day was described by patrol Capt. Wayne Parish, detective Lt. Merton Keolanui and communications Lt. Stanley S. Yamamoto.
>
> And their desks are now the end of the line for police reporters inquiring about news.
>
> Act 45, prohibiting law enforcement records of arrests from being released to anyone before conviction, closed off most of this reporter's beat yesterday.

Act 45 of the state legislature declared that all records relating to the questioning, apprehension, detention of charging of criminal suspects "shall be deemed confidential." A few weeks later a state judge enjoined the police departments in Honolulu and Oahu from refusing access to police records. But a judge on the Island of Hawaii went the other way, allowing police to keep new arrests confidential.

It took another act by the legislature to undo Act 45, but it took almost a year. When it did so, the legislature said there had been "varying and sometimes conflicting interpretations or applications of this Act."

Early in 1975 the Oregon legislature, using the LEAA regulations as a guide, passed HB 2579, which closed most criminal records to everyone except law enforcement agencies and defendants. The law neglected to spell out the exceptions, and as a result police officers could reveal only that a crime had been committed. They could not say who was arrested, charged, tried, convicted, sentenced or released. The law went into effect in mid-September.

Less than 24 hours later, according to the Portland Oregonian, the county jail in Pendleton was jammed with 175 arrestees. All but 14 could have been out on bail but, according to one sheriff's deputy, "We're having a hard time getting rid of them, because we can't tell their friends or relatives they're in here." This was not what the legislature contemplated, but companion laws that were supposed to clarify the key sections were sidetracked.

A special session of the legislature had to be called four days after the act went into effect to repeal the law.

A number of other states have clearly encountered problems interpreting the signals from the federal government. This may be seen in a selection of lead paragraphs from around the country as states attempted to implement the LEAA regulations.

From the Omaha World-Herald:

> New federal regulations now taking effect nationally will cut off access to local police arrest records

for persons and agencies who have relied on them in the past.

Police Chief Richard Anderson said the cutoff will be drastic...

From the Athens (Georgia) Banner-Herald:

Noncriminal justice agencies, with few exceptions, will find it increasingly harder, if not impossible, to determine whether an individual has a criminal record, as local criminal justice agencies attempt to "afford greater protection of the privacy of individuals."

From the Denver Post:

LAKEWOOD--It no longer is possible for cities to order background criminal checks of applicants for the various kinds of licenses they dispense, a disbelieving city council committee learned Monday night.

This stunning news...

In Lakewood's case, the city could no longer determine whether persons with criminal records were applying for liquor licenses. The Post called it "a stupidly sweeping" rule, imposing on local communities values that in no way represented their wishes. "A mockery of grassroots democracy," the paper said.

Is it more important to know who is applying for and running a local saloon or to give the operator the protection of secrecy? Under the federal interpretation an entire St. Louis mob could get qualified to run liquor establishments throughout the Denver area and no one would know it. Uncle Sam would be underwriting their security.

What happened in a number of places was that police officials gave reporters a one-shot look at daily crime

reports and forbidding subsequent access. The problem is that many arrests which at first appear insignificant could turn out to be gangbusters a few weeks or months later. No one can predict what kind of injustice, political scandal or human tragedy will result from the actions of public law enforcement agencies. Today's drunk driving suspect could be next year's candidate for governor. If the arrest was quietly dismissed, was there a reason?

The LEAA rules would have made it difficult for anyone but an experienced and persistent reporter to effectively cover the criminal justice beat. In October, 1975, Omaha World-Herald reporter James Fogarty wrote two stories which illustrate the problems:

> Terry R. Holman, a fugitive who was found in the company of a missing Carter Lake youth Oct. 11, is on probation from Portland, Ore., for a sex-related felony conviction, the World-Herald has learned.
>
> Judge Alfred Sulmonetti of Portland said in a telephone interview that Holman came before him on a charge of sodomy in early 1973.
>
> Holman now is charged in Omaha with kidnaping Walter Todd Bequette, 15, who was found with Holman in Clarkston, Wash. Holman also faces a child molestation charge in Tulsa, Okla.
>
> The World-Herald sought information on Holman's record to show how the criminal justice system functioned in this case. Some requests for information from criminal justice agencies were granted, others were refused.
>
> Omaha police acknowledged that they have a complete record of Holman's arrests and convictions. Chief Richard Anderson refused to release its contents because, he said, new federal guidelines restrict access to criminal records.
>
> Sulmonetti, a senior judge of the circuit court of Oregon, said Holman pleaded guilty to committing sodomy on a 7-year-old boy who lived next door to Holman.

> Records of the district attorney's office in Multnomal County, where Portland is located, show that Holman pleaded guilty to sodomy as part of a plea bargain under which two charges of sexual assault against children were dismissed. Holman was sentenced to five years probation.
>
> Portland police refused to discuss the nature of the past cases involving Holman because of the new federal guidelines.
>
> At the request of the World-Herald, a reporter from the Portland Oregonian newspaper sought the police records and he said he also was refused....

In this case, since the reporter could not get the information from either the Omaha, Portland or Tulsa police, he had to resort to calling the judge in Portland. Had the judge also refused to discuss the case, it might have been impossible to write the story.

It is interesting that in a different situation, when the morals of the Omaha police force were being challenged, the information about a prostitute's criminal record was forthcoming.

The woman set off a certain amount of controversy when she told a local radio interviewer that she had had sexual relations with about 60 Omaha police officers, both on and off duty--even during the morning hours while officers were supposed to be patrolling a tornado ravaged section of the city.

Her claims brought mixed reactions from the police, the story said. One reaction was to tell the reporter that the woman had been convicted of soliciting for prostitution. The deputy police chief said he had once arrested

her "after she allegedly made a deal with him to engage in prostitution."

The other reaction came from the president of the local police union, who said, "We have 107 officers, over 50 who claim to be among the 60."

The reporter was initially refused the record but remembered the conviction himself. Said his city editor, "He managed to pin down the conviction date and fine by going to the prosecutor's office and getting enough guidance from them to pin it down." Had the reporter not remembered, he could only have tracked down the information by making an endless search through daily police reports. In most cases it just isn't worth the time.

St. Louis

Missouri has shown a sensitivity to both the need for open government and the right to privacy. But something happened to the balance. In 1973 the legislature passed an open meetings law that applies to all government bodies. But in the interest of protecting the privacy rights of the accused, it passed a seemingly harmless amendment to the law. It requires that if a person is arrested and not charged within 30 days, all records of the arrest, detention or confinement are closed. If there is no conviction on the arrest within one year, the information is destroyed.

Interpretations of the right to privacy and the

criminal records law have caused both St. Louis newspapers serious problems in attempting to expose questionable performances by local officials. The examples illustrate the tendency of some officials, when under attack by aggressive reporters, to shut down channels to information.

The Post-Dispatch began a series of articles in August, 1975, about the questionable and probably unconstitutional manner in which people were being involuntarily committed to psychiatric institutions--and the politics that seemed to go hand in hand with this procedure.

The stories showed that most patients were being committed without proper medical proof and with barely a chance of appeal. The great majority of the cases were handed by the probate judge to a former associate on the city board of aldermen for representation. The alderman, Frank C. Boland, had collected at least $33,930 for his services over a period of six years.

On September 28, Post-Dispatch reporter Judson W. Calkins wrote,

> Alderman Frank C. Boland of St. Louis, the court-appointed lawyer in nearly all psychiatric commitment cases in the city, has failed to routinely discuss his cases with medical personnel, examine medical records or spend appreciable time with his clients, a study by the Post-Dispatch has found.
>
> In only one of 375 commitment cases that Boland has handled in the last six years that have reached the hearing stage has he succeeded in obtaining his client's release from a psychiatric institution, records indicate.
>
> He has never appealed an order by the St. Louis Probate Court to involuntarily hold a mental patient,

and he has never sought an independent psychiatric evaluation of a patient to test the petitioning doctor's findings, court records indicate.

A few days later, claiming concern for the privacy of the committed patients, Probate Judge Donald Gunn refused to grant the Post-Dispatch further access to court records on psychiatric commitments. Judge Gunn said he was doing so because the newspaper violated an understanding that the names of patients would not be used in the stories. The names were not used, but reporter Calkins did interview some of the patients to learn what kind of legal help they had received.

Gunn then removed material in the commitment files dealing with medical evidence, saying it was "for the protection of such patients and their families."

The Post-Dispatch has filed suit in a state court of appeals to have those records re-opened, asserting that there was "no basis at all to assume that a person committed wants no one to be able to review the basis for such commitment."

Newspapers are not interested in publishing the identities of mental patients or, generally, any other recipients of state services--certainly not without their consent. But just as any other researcher looking for evidence of how the state performs its role, newspapers must have access to such records. It is not the privacy of the patients that is at stake but the secrecy of the government.

Another suit has been filed by the St. Louis Globe-

Democrat challenging the state open meetings law. Most editors and legislators paid scant attention to the privacy amendment, agreeing that arrest records often unfairly branded many who were accused but not convicted of crimes. But the editors and legislators had not seen the law in its practical application.

The Globe-Democrat had reason to believe that one local magistrate was routinely dismissing drunk driving cases. It would have been a simple matter to investigate, the paper thought. All it had to do was check court records to find out the dispositions of such cases. The problem was that the very cases the newspaper wanted to inspect were no longer a matter of public record. Under the state privacy law they had been destroyed because no conviction had followed.

The very cases the newspaper suspected of being kicked under the rug were the ones that were closed. "It seemed to us ridiculous that you couldn't check the performance of a court," said assistant managing editor Ray J. Noonan. Without documentation, they were up against a blank wall.

California

California has enacted a criminal records law which its own attorney general, Evelle J. Younger, has described as "overly restrictive." It apparently prevents school districts from checking for criminal records of prospective

employees, prevents utilities from finding out whether applicants for security jobs or repairmen who enter private homes have criminal records, and bars police from disclosing criminal record information.

The Los Angeles Times called it "a classic illustration of a law that creates more abuses than it was intended to prevent."

It is worth noting that this is the state in which two attempts were made on the life of President Ford, one of them allegedly by a woman with an extensive record. This information, it seems, was vital to public knowledge of the case.

Houston

Houston is an example of a city that has traditionally, although informally, made all criminal records available. However, the city attorney ruled that the state open records act of 1973 did not cover criminal offense reports and records and the Houston Police Department immediately cut the press off.

The Houston Chronicle went to court, saying it was not aware of any privacy law which would justify closing down public records. The question of whether a person's right to privacy has been violated was a matter between that person and the press, the Chronicle said, and the available remedy was libel and invasion of privacy damages. The

Houston police could not make that determination: "Such a concept is called a police state." The police were enjoined by the lower courts, but an appeal was in progress.

Nashville

The Federal Privacy Act, as noted earlier, defers to the Freedom of Information Act. The authors of the act and the heads of the Privacy Protection Study Commission, the agency established by the act, say it has no effect whatsoever on the operations of the press. And yet, at least one federal official, the U.S. Attorney for the Middle District of Tennessee, saw it quite differently. In a memo of September 25, 1975, to newsmen covering his office, Charles H. Anderson said the act "will have a far reaching effect on the information available to you from the various federal executive offices."

Anderson said the "complex and obscure" act seemed to be in conflict with the Freedom of Information Act. "Apparently our discretion to release information has been eliminated," he said. It was his "conservative, cautious" interpretation that "if the information should not be released under the Freedom of Information Act, then it cannot be disclosed under the Privacy Act, without the consent of the individual to whom it pertains."

Anderson added that in practice "this means we cannot disclose the age, employment, marital status and other

'background information' relating to a criminal defendant, or the circumstances surrounding an arrest, as we have in the past, or other 'personal information' in a civil suit."

CONCLUSIONS

It will not be easy to find the proper balance between the privacy rights of individuals and the necessity that society inform and govern itself. But in the view of academic, congressional, legal and press experts, it must be done. The alternatives would appear to be more of the kind of mass confusion that has spread throughout the states and the continuing proliferation of personal information through electronic data systems.

Legislation regulating the interstate exchange of personal information, including criminal records, is viewed as an absolute necessity. But the press has a strong interest in seeing that such laws and regulations do not touch its vital information channels and that the public record remains just that.

The press is certainly entitled to conviction records and all records of court proceedings. This is one area in which the computerization of records will greatly aid the press and other segments of the public that have a legitimate need for such information. And clearly police blotters should remain open for public inspection.

It is apparent also that the press cannot adequately

do its job without access to criminal records--including records of arrests. These should be available to the press on request. In most places this is now done as a matter of custom and not law. Perhaps states should be permitted to open or close these records by law, but in the absence of such action by the states, it is a good idea to have a national policy declaring them open.

One suggested cure for the discrimination practiced against those with arrest records is a law which, like Title VII of the Civil Rights Act, states that employers may not take arrest records into consideration and may not ask applicants to furnish such information. Obviously such a law would be difficult to enforce--so is Title VII--but experience shows that people will often comply with the law simply because it is law. A few states already have such anti-discrimination statutes.

Constitutional authorities warn that the press had better take care that the frequent glimpses it gets into the private lives of individuals and even, in many cases, public officials don't result in unwarranted invasions of privacy. A responsible press is not duty-bound to hunt relentlessly for the kind of "truth" which, while it qualifies as good gossip, is not news. Official scandal needs to be rooted out, but not all public officials must be portrayed as suspect nor their families forced to live in fish bowls.

As Norman Isaacs of the Wilmington newspapers said, "We brought a lot of this trouble on ourselves. We're in deep trouble with the public." Among the reasons: frequent disregard for the secrecy of the grand jury process; press vendettas against certain community interests; and failures to report crime news with equity--such as not reporting with equal weight--the dropping of charges against someone whose arrest has been publicized.

"Most people are so busy reporting the defeats of life they can't see the victories of life as news," Isaacs said.

Not only equity but sensitivity to the other side of the First Amendment coin--privacy--is clearly needed.

What the government and private interests are doing to people is one of the biggest stories of these times; to whom they are doing it is sometimes, but not always, an essential part of that story. Occasionally, even though great care is taken, bones will be broken. That is probably the price society has to pay for its commitment to the First Amendment, but there is a duty to see that the number of broken bones is limited. It may be constitutionally defensible to broadcast a name from the public record, but not always ethical. Such disregard for the "bonds of propriety and decency" creates a climate favorable to curtailing the rights of the press.

As Charles B. Seib, ombudsman for the Washington Post,

said in a recent column, "An atmosphere of public distrust encourages police officials to attempt to conceal arrest records, judges to issue gag orders, bureaucrats to withhold information, and Congress to consider restrictive legislation."

What it comes down to, then, is whether the press can continue to act in the public interest and, at the same time, serve the interest of the individual.

Arthur Miller put it this way:

> I think that what we have achieved in this country is a sort of a truce--an uneasy one but nevertheless a truce--in which as long as the press by and large exercises its discretion as to what to publish, within tolerable limits, the courts are going to leave it alone out of commitment to the First Amendment.

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